SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

NO. [redacted] 173

IDA PHILLIPS,

Petitioner,

—v.—

MARTIN MARIETTA CORPORATION

Respondent

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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OCTOBER TERM, 1969

No. 1058

IDA PHILLIPS,

Petitioner,

—v.—

MARTIN MARIETTA CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Question Presented

Whether the refusal to hire women with pre-school aged children is per se a violation of the sex discrimination prohibition of 42 United States Code § 2000e-2(a).

Statement Of The Case

Petitioner, Ida Phillips, applied for the position of Assembly Trainee with the respondent, Martin Marietta Corporation. Upon being informed that women having pre-school age children would not be considered for this position, she filed the action below complaining that this employment practice constituted unlawful sex discrimination under 42 United States Code 2000e-2(a).

The District Court struck the reference to pre-school age children from the complaint but permitted it to stand otherwise in order to afford the petitioner an opportunity to present any factual evidence of discrimination on the part of the respondent. Martin Marietta Corporation then filed a motion for summary judgment accompanied by supporting affidavits containing evidence to the effect no discrimination in employment opportunities for women had occurred. The petitioner at no time presented any evidence; however, the District Court did assume for the purpose of the motion that men with pre-school age children would have been hired. Contrary to the petitioner's statement of the case, there was no evidence that Mrs. Phillips had a high school background or that this was the only pre-requisite to the job, nor is there anything in this record concerning the employment practices of the respondent in regard to inquiry or requirements as to the family situation of prospective employees. Based on the evidence offered by the respondent and in view of the absence of evidence by the petitioner, the District Court ruled that there was no material issue of fact and granted a summary judgment in favor of Martin Marietta Corporation. This was appealed to the Fifth Circuit Court of Appeals, which resulted in the opinion of which review is now being sought.

Introduction

The petition seeking review relies on two grounds, first, that the decision below conflicts with decisions of other courts of appeals and second, that it is an erroneous construction of important federal legislation which inhibits its effectiveness. To decide whether there is a conflict or construction detrimental to the effectiveness of the Act, we must at the outset note with some precision what was decided. The issue presented to the Court of Appeals was whether it was per se a violation of Title VII to decline to hire women with pre-school age children. Respondent took the position that in declining to hire Mrs. Phillips, it did so on the basis of a qualification concededly not proscribed by the Act, pre-school age children, and not because she was a woman. Whether the application of this non-prohibited standard results in discrimination against women would be resolved as a factual matter. Petitioner maintained that the acts alleged constituted a per se violation of Title VII, and therefore there need be no factual inquiry into the actual effects of the practice.

In its decision, the Court of Appeals decided only that the application of the non-prohibited criterion (pre-school age children) to one sex did not in itself automatically violate Title VII. As the court put it,

> "When another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion or national origin. It becomes the function of the courts to study the conditioning of employment on one of the elements outlined in the statute coupled with the additional requirement, and to determine if any individual or group is being denied work due to his race, color, religion, sex or national origin."

In the instant case, both the District Court and the Court of Appeals were persuaded that the evidence showed Martin

Marietta did not in fact discriminate against women generally and there was no evidence whatever that Mrs. Phillips was individually singled out because of her sex.[1]

I.

The Decision Below Does Not Conflict With Decisions of Other Courts of Appeals

There is no real question but that this case does not present a direct conflict with any decision of another court of appeals. As the opinion below says, "none of the cases reviewed by this Court deal with the specific issue presented here" and no case since then has, to counsel's knowledge, done so. Petitioner tacitly concedes this with the statement that the decision conflicts "in principle" with other court of appeals decisions.

Although not clearly specifying the cases on which it relies for conflict, Petitioner seems to suggest that the decision below is inconsistent with *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969). See p. 6 of the Petition. A fair review of this case will show that it in no way presents the issue involved in the instant case. *Bowe* involved the bona fide occupational qualification portion of the Act. The specific question was whether an employer's blanket exclusion of women from jobs which entailed lifting 35 pounds or more was a legitimate bona fide occupational qualification.

In the present case, the bona fide occupational qualification exception is in no way involved. The District Court struck the allegations of the complaint relating to pre-school age children prior to the time Martin Marietta was required to

[1] According to the uncontroverted affidavit filed by Martin Marietta, 70% to 75% of the applicants for the position sought by Mrs. Phillips were women and 75% to 80% of those hired for the job were women. These figures represent, as is the fact, that Martin Marietta is in no wise averse to employing women. Mrs. Phillips offered no evidence on her own behalf.

file its answer; however, he permitted other allegations of the complaint to stand to provide the plaintiff the opportunity to present evidence of any actual discrimination. When the plaintiff failed to produce any such evidence, a summary judgment on behalf of the defendant was granted. After reference to pre-school age children was stricken from the complaint there was neither reason nor relevance for Martin Marietta to raise the bona fide occupational qualification defense to justify the practice.[2] That the bona fide occupational qualification provisions of the Act were not an issue considered by the Court of Appeal below was recognized in the opinion:

> "The Defendants do not choose to rely on the 'bona fide occupational qualification' section of the Act, but, instead, defend on the premise that their established standard of not hiring women with pre-school age children is not per se discrimination on the basis of 'sex'."

Bowe, then, turned on a separate and distinct provision of the Act, one expressly not involved in this case.

Petitioner also appears to suggest there may be some conflict between the present case and *Local 53, Heat & Frost Insulators Workers* v. *Volger*, 407 F.2d 1047 (5th Cir. 1969); *Papermakers Local 189* v. *United States*, 416 F.2d 980 (5th Cir. 1969); and *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123 (8th Cir. 1969). It should initially be noted each of these cases concerns racial, not sex discrimination, and the first two arise in the Fifth Circuit, therefore not appropriately representing a conflict between circuits.

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[2] In the event the employment criterion here involved is determined to be discriminatory, Martin Marietta would then raise the bona fide occupational qualification defense, and seek to support it with the appropriate evidentiary showing. But before the bona fide occupational qualification becomes an issue, it must first be determined that there is discrimination within the meaning of the Act, which the defendant has denied throughout these proceedings. Only then would the bona fide occupational qualification "excuse" become relevant.

More importantly, a fair reading shows none of these cases involved the same point, "in principle" or otherwise, as the decision below. *Local 53, Heat & Frost Insulators Workers, supra*, began with the concession that the union's acts and policies were discriminatory, and the opinion involved a determination of whether the injunctive relief granted by the district court was proper. In the decision below, the court was dealing with the threshold question of the existence vel non of discrimination. To the same effect is *Papermakers Local 189* where the problem was not whether there was discrimination, but to fix what steps would be necessary to correct the effects of a separate and discriminatory seniority system which had existed prior to the Act.

In the case which did not arise in the Fifth Circuit, *United States* v. *Sheet Metal Workers, Local 36*, the Court of Appeals, reversing the District Court, made a determination that the Act had been violated after an extremely thorough analysis of the evidence which had been produced, and then established in detail the relief to be granted. What happened in *Sheet Metal Workers* is consistent with what the court below held: that the determination of whether the complained of practices of the defendant are discriminatory is to be made by looking at the results of their use.

The question presented below, whether the refusal to employ women with pre-school age children constitutes a per se violation of the Act irrespective of the consequences it produces, has not been faced by any other court.[3] Since the cases cited by the Petitioner as in conflict each present different issues than were before the court below, and since two arise in the same circuit, there is not conflict, even "in principle."

Respondent respectfully suggests that Petitioner's attack on the decision of the District Court below is not appropriate. The District Court's expression of its feeling as to the differences between women and men with pre-school age children contained in the unreported ruling on the motion for summary judgment, however realistic it may be, was not the rationale of the Court of Appeal's decision below. The opinion below

did not concern itself with any generalizations about the sexes, but decided merely that the criterion applied did not per se violate Title VII. It is review of that opinion that is presently being sought, not the order of the District Court.

II.

The Decision Below Does Not Frustrate the Aims or the Effectiveness of Title VII.

In view of the absence of any real conflict, it is apparent that the primary ground upon which review is sought is the conjectural deleterious effects which Petitioner undertakes to hypothesize as a result of this decision. While Chief Judge Brown's statement "If 'sex plus' stands, the Act is dead" has a certain forensic ring, it is not a true characterization.

The opinion below held only that where a non-prohibited employment criterion is applied to sex, it is not discrimination based on sex alone. Whether by the application of such criterion there has been a discrimination based on sex must be determined by a factual inquiry of the effects of the complained of employment practice. This, of course, is precisely what the courts require in almost every case arising under Title VII, and is what Mrs. Phillips declined to do. In most of the Title VII cases, the complained of practice is unquestionably neutral on its face, but the court after examining its effect determines whether it actually produces a discriminatory result. For example, in *Local 53, Heat & Frost Insulators Workers* v. *Volger, supra*, at 1054, the court determined that the requirement of recommendation by present members of union and favorable vote by majority (neutrally applied to

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[3] Most directly bearing on the present question is *Cooper* v. *Delta Airlines, Inc.*, 274 F. Supp. 781 (E.D. La. 1967), *appeal dismissed*, No. 25,698 (5th Cir., Sept. 1968), where the court held Delta's termination of its women stewardesses on marriage was based on marriage, not sex, and, therefore, did not violate the Act.

black and white applicants alike) was in fact used in that case in a discriminatory manner.

Again, in *United States* v. *Sheet Metal Workers*, *supra*, the bulk of the court's extensive opinion deals with a factual analysis of whether the practices of the union constituted discriminatory procedures under the Act.

The opinion below does not hinder the effectiveness of the Act because there is no more burden placed on the plaintiff by virtue of this decision than exists in the practice presently followed under Title VII cases. The Court in the cases cited makes a determination, based on evidence duly presented, as to whether the effect of the defendants practices is to work a prohibited discrimination. Thus, in the present case, if the use of the pre-school age children employment standard applied to women did in fact work a discrimination, the plaintiff was free to produce evidence on the point. The nature of such proof would be the same as in any other cause where it is contended an employer or a union is making use of tests or devices to discriminate. This procedure is consistent with what the Courts have been doing in Title VII cases, in apparently effectively administering the Act.

Petitioner seeks a construction of the Act characterizing the complained of standard as being a per se violation of the Act, and thereby avoiding the necessity of making any showing that women have in fact been deprived of employment opportunity by the practice attacked in the suit. When the courts below declined to make this construction, they simply left the Petitioner in the same position she would have been in had an undisputedly neutral employment practice been challenged. The opinion below does not add any burden to plaintiff's seeking to avail herself of the Act, but only denies her relief where no showing of a discriminatory effect is made.

Petitioner also seeks to raise the specter that this decision will provide a vehicle for the nefarious plans of those lying in wait to discriminate on grounds other than sex, particu-

larly, it is suggested, on racial grounds. We must, of course, note that this decision is confined to the "sex" portion of the Act and whether it will be followed by other circuits or applied to other classifications under the Act is, at this point, an open question. Naturally one could, by conjoining race with some other criterion, work a racial discrimination, but he could also achieve the same result by a standard which applied to all equally, as, for example, the membership approval required in the *Local 53* case. In either case, if the Equal Employment Opportunity Commission and the courts find that racial discrimination is in fact occurring, the appropriate relief may be obtained just as it is now being obtained in the courts.

It is also suggested that because of the high proportion of non-white mothers who work and have children under six, the onus of the decision below will fall along racial lines. For this to be a ground for review, we must presuppose a pattern or practice aimed at excluding women from the work force. To be sure, instances of such discrimination may be pointed out, but there is no evidence in the record presented by this case, nor suggested in the petition, to indicate black women with pre-school age children will be excluded from the work force because of the decision below. As noted previously, if such were the goal of employers, it doubtless would be sought to be achieved by means far more subtle than we are dealing with in the present case and would be dealt with in the same manner as racial discrimination cases are presently being handled. The fact is that many of the black females in the work force are employed as domestic and day workers who are not affected by the legislation in question.[4]

In seeking this court's review, the petition cites statistics to the effect that there are many women with pre-school age children in the labor force, and then asserts this decision will prejudice their work opportunities. There is, however, no nexus, other than counsel's assertion of casual connection, between the premise and the conclusion and therefore is a non-sequitur as far as is reflected by the record or observable facts. No explication of how the harm foreseen will flow

from the decision below is articulated. The appeal to this court's concern with individual rights and liberties is not well founded on anything contained in the record herein.

CONCLUSION

The decision below determined that in those cases in which a pre-employment criterion was used which is not one of the five specifically proscribed by Title VII, the question of whether it is discriminatory is to be decided by factually examining the effect of the use of the standard. This decision is correct, and it is not in conflict with any other decision of a court of appeal. The objectives of Title VII are in no way impaired, since the case requires exactly the same showing that is made in cases where an admittedly neutral qualification is claimed to be discriminatory. Because there is no conflict and because this interpretation of the federal statute will not frustrate the administration of the Act, respondent respectfully suggests that the Writ of Certiorari should not be granted.

Respectfully submitted

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[1] In 1964, 29.9% of the non-white female workers were engaged as private-household workers. This was the largest single category. U.S. Dept. of Labor, *1965 Handbook on Women Workers*, Bull. 290 at 103.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition to a Petition for a Writ of Certiorari has been furnished by mail this day of February 1970 to the following: Jack Greenberg; James M. Nabrit, III; Norman C. Amaker; William L. Robinson; Lowell Johnston; Vilma Martinez Singer, 10 Columbus Circle, New York, New York 10019; Earl M. Johnson, 625 West Union Street, Jacksonville, Florida 32202; and George Cooper, 435 West 116th Street, New York, New York.

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